INDEX TO APPENDIX

	PAGE
Order (Tr. 65)	14a
Findings of Fact (Tr. 38)	14a
Petition for Review	1a
Initial Decision (Tr. 38)	4a
Docket Entries	1a

APPENDIX.

Docket Entries

The complaint issue on the 10th day of January, 1956 (Tr. 1); Answer filed February 17, 1956 (Tr. 8); hearings were held; The Trial Examiner's "Initial Decision" was filed January 31, 1957 (Tr. 38); Appeal to Commission March 6 (Tr. 43); Commission's ruling on Appeal June 4, 1957 (Tr. 67).

PETITION FOR REVIEW OF AN ORDER TO CEASE AND DESIST
(Filed Aug 9 1957)

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

* * (Caption—No. 12106) * *

To the United States Court of Appeals for the Seventh Circuit and to the Honorable Judges of said Court.

Your petitioners, R. B. James and Patrick Zurla, respectfully represent:

1. That your petitioners are co-partners and are doing business under the name of Chicago Board Company.

The Nature Of The Proceedings

2. That on January 10, 1956, the Federal Trade Commission caused its complaint (Docket No. 6482) to be issued against your petitioners, attempting to allege the use of unfair methods of competition, unfair acts, and practices in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 25th, 1914; as amended March 21st, 1938, entitled "An Act to Create a Federal Trade Commission,

to define its powers and duties, and for other purposes"; the answer to said complaint was filed thereafter by your petitioners in said proceedings;

That on June 12th, 1957, the Federal Trade Commission served its report and its purported findings as to the facts and conclusions of law and its purported order to cease and desist against your petitioners, which order is in substance as follows:

> "It is ordered that respondents R. (Ruby); B. James and Patrick Zurla, individuals and co-partners, trading as Chicago Board Company or under any other trade name or names, their representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:
>
> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, pushboards, punch cards, or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

This proceeding is brought to have said order reviewed and set aside.

The Facts And Statutes Upon Which Venue Is Based

3. The Federal Trade Commissioin Act, (section 45, title 15, U.S.C.A.) provides that any person required by an order of the Federal Trade Commission to cease and desist from using methods of competition, unfair acts or practices, may obtain a review of such order by filing a petition in any circuit court of appeals of the United States within any circuit where the method of competition, unfair or deceptive acts or practices in question were used or where such person resides or carries on said business.

Your petitioners' principal place of business is in the City of Chicago, County of Cook, State of Illinois, and

that now and at all times herein mentioned have been carrying on said business in the City, County and State aforesaid and within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit.

Grounds On Which Relief Is Sought

4.

(1) The facts alleged in the complaint on file herein are not sufficient to give the Commission jurisdiction to issue a cease and desist order against Petitioners.

(2) The acts and practices of the Petitioners are not a violation of the Federal Trade Commission Act.

(3) The finding of facts are not sufficient to support the order.

(4) The proceeding is not to the interest of the public as required by the Federal Trade Commission Act.

(5) The order to cease and desist is contrary to and against law.

Your petitioners, believing themselves aggrieved by said cease and desist order of the respondent and considering it unauthorized, erroneous, void, and unlawfully prejudicial to your petitioners, and your petitioners being without remedy in the promises except in this court as by statute in such cases made and provided, hereby petition for a review of said order of the commission by this Honorable Court.

Prayer For Relief

5. Your petitioners pray that this Honorable Court review the findings and order of the Federal Trade Commission in said cause and enter a decree in this Honorable Court setting aside the order of the Federal Trade Commission entered herein against your petitioners.

Patrick Zurla
R. B. James
Petitioners

Marvin M. Ruttenberg
33 N. LaSalle St.
Chicago, Illinois
Attorney for Petitioners

County of Cook
State of Illinois

R. B. James and Patrick Zurla depose and say that they are the petitioners above named, that they have read the above and foregoing petition, and that the same is true to their best knowledge and belief.

Patrick Zurla
R. B. James

Subscribed and sworn to before me on this the 8th day of August, 1957.

Mildred A. Ruben
Notary Public

INITIAL DECISION OF THE TRIAL EXAMINER.

1. Respondents R. (Ruby) B. James and Patrick Zurla are individuals and co-partners trading and doing business as Chicago Board Company, with their office and principal place of business located at 2352 West Cermak Avenue, Chicago, Illiinois.

2. Respondents are now, and have been for more than two years last past, engaged in the sale and distribution, in commerce, to manufacturers of and dealers in various articles of merchandise, of devices commonly known as pushcards and punchboards. Respondents cause and have caused said devices, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof at their points of location in the various states of the United States other than Illinois, and in the District of Columbia. There is now and has been for

more than two years last past a substantial course of trade in such devices by said respondents. In 1954 and 1955 respondents' sales amounted to approximately $500,000 annually. The pushcards and punchboards are so designed, prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used by retailers in the sale and distribution of merchandise to the public. They are of many kinds, all of which, though varying in detail, involve the same features of chance or lottery.

3. Some of said pushcards and punchboards have printed on the faces thereof, legends or instructions which explain the manner in which said devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. Others have blank spaces where the user may place his own legends or instructions. The prices of the sales on the pushcards and punchboards vary with the individual device. Upon payment of the amount specified, each purchaser is entitled to one punch or push from the punchboard or pushcard, and when a punch or push is made, a disc or printed slip is separated from the device and a number is disclosed. The number is effectively concealed from the purchaser or prospective purchaser until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise, and purchasers securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Purchasers who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the public wholly by lot or chance.

Some of these devices may be, and sometimes have been, used to distribute cash prizes, but the primary and usual use is for the sale and distribution of merchandise.

4. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, golf equipment, cosmetics, clothing, and other articles of merchandise in commerce between and among the various states of the United States and in the District of Columbia, purchase and have purchased respondents' pushcard and punchboard devices, and pack and assemble, and have packed and assembled, assortments consisting of various articles of merchandise together with said pushcard and punchboard devices, and have sold said assortments to retail dealers and others for resale to the public. Respondents thus supply to and place in the hands of retail dealers and others, through the channels of interstate commerce, the means of conducting lotteries or games of chance in the sale and distribution of merchandise to the general public.

5. Controlling decisions have now well settled that the practice of selling goods by a plan or method involving the use of a game of chance or lottery is contrary to the established public policy of the Government of the United States, and in violation of the Federal Trade Commission Act; that selling in interstate commerce a means or instrumentality by which merchandise can or may be sold by lotteries or games of chance is an unfair method of competition; and that placing in the hands of others the means of engaging in such acts or practices is likewise contrary to public interest and public policy.

Conclusions

This proceeding is in the public interest.

The acts and practices of respondents, as hereinabove described, are all to the prejudice and injury of the

public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Therefore,

It Is Ordered that respondents R. (Ruby) B. James and Patrick Zurla, individuals and co-partners, trading as Chicago Board Company or under any other trade name or names, their representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, pushcards, punchboards, or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

/s/ J. Earl Cox
J. Earl Cox,
Hearing Examiner.

OPINION OF THE COMMISSION

By Gwynne, Chairman:

The complaint charges respondents with having violated the Federal Trade Commission Act by the sale and distribution in commerce of punchboards and pushcards used and for use in selling and distributing merchandise by lottery or chance. At the conclusion of the hearings, which consisted of testimony and exhibits offered by counsel for the complaint and of stipulations entered into between the parties, the hearing examiner issued an order directing respondents to cease and desist from:

> "Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, pushcards, punchboards, or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

The facts are not in dispute. Respondents' general method of operation is set out in Paragraph 2, 3 and 4 of the initial decision which are as follows:

"2. Respondents are now, and have been for more than two years last past, engaged in the sale and distribution, in commerce, to manufacturers of and dealers in various articles of merchandise, of devices commonly known as pushcards and punchboards. Respondents cause and have caused said devices, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof at their points of location in the various states of the United States other than Illinois, and in the District of Columbia. There is now and has been for more than two years last past a substantial course of trade in such devices by said respondents. In 1954 and 1955 respondents' sales amounted to approximately $500,000 annually. The pushcards and punchboards are so designed, prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used by retailers in the sale and distribution of merchandise to the public. They are of many kinds, all of which, though varying in detail, involve the same features of chance or lottery.

"3. Some of said pushcards and punchboards have printed on the faces thereof, legends or instructions which explain the manner in which said devices are to be used in the sale or distribution of various specified articles of merchandise. Others have blank spaces where the user may place his own legends or instructions. The prices of the sales on the pushcards and punchboards vary with the individual device. Upon payment of the amount specified, each purchaser is entitled to one punch or push from the punchboard or pushcard, and when a punch or push is made, a disc or printed slip is separated from the device and a number is disclosed. The number is effectively concealed from the purchaser or prospective purchaser until a selection has been made and

the push or punch completed. Certain specified numbers entitle purchasers to desiginated articles of merchandise, and purchasers securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Purchasers who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the public wholly by lot or chance. Some of these devices may be, and sometimes have been, used to distribute cash prizes, but the primary and usual use is for the sale and distribution of merchandise.

"4. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, golf equipment, cosmetics, clothing, and other articles of merchandise in commerce between and among the various states of the United States and in the District of Columbia, purchase and have purchased respondents' pushcard and punchboard devices, and pack and assemble, and have packed and assembled, assortments consisting of various articles of merchandise together with said pushcard and punchboard devices, and have sold said assortments to retail dealers and others for resale to the public. Respondents thus supply to and place in the hands of retail dealers and others, through the channels of interstate commerce, the means of conducting lotteries or games of chance in the sale and distribution of merchandise to the general public."

Paragraph 5 of the initial decision is as follows:

"5. Controlling decisions have now well settled that the practice of selling goods by a plan or method involving the use of a game of chance or lottery is contrary to the established public policy of the Government of the United States, and in violation of the Federal Trade Commission Act; that selling in interstate commerce a means or instrumentality by which

> merchandise can or may be sold by lotteries or games of chance is an unfair method of competition; and that placing in the hands of others the means of engaging in such acts or practices is likewise contrary to public interest and public policy."

Respondents' appeal claims, first, that Paragraph 5 is not a finding of fact but a legal conclusion and should be stricken, and, second, that the initial decision is not supported by the findings.

It is true that Paragraph 5 contains conclusions of law which the hearing examiner deemed applicable to the factual findings made in Paragraphs 1 to 4, both inclusive. The location of Paragraph 5 in the initial decision in no way interferes with the findings of fact in the preceding paragraphs and offers no justification for striking it from the record. The findings of fact made by the hearing examiner are clearly supported by the greater weight of the evidence and from a consideration of the entire record are adopted as the findings of the Commission.

The law covering the matters involved herein is well settled and does not require an extensive discussion here. Section 5(a)(1) provides:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

In *F.T.C.* v. *R. F. Keppel & Bro., Inc.* (1934) 291 U. S. 304, the Court commented on the broad and flexible character of the phrase "unfair methods of competition", which was the basis of Section 5. Since then the law has been further broadened to include unfair and deceptive acts or practices. Although the Commission found in the *Keppel* case that the methods of respondents (selling candy by chance or a lottery) resulted in a substantial diversion of trade from other manufacturers of candy, nevertheless, the Court put the decision on the broad ground expressed as follows:

> "Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy."

This conclusion has been consistently followed by the Courts. In *Wolf* v. *F. T. C.* (1943) 135 F. 2d 564, the Court held that the use of a game of chance for the distribution of merchandise is an unfair act or practice in commerce. In answer to respondent's argument that there was no proof of injury to competition, the Court called attention to the 1938 amendment of the Federal Trade Commission Act:

> "to broaden the scope of the jurisdiction of the Commission to enable it to proceed against any person using an unfair or deceptive act or practice in commerce as well as an unfair method of competition, provided it appears to the Commission that such proceeding would be in the public interest (15 U.S.C.A. sec. 45). Hence it is no longer necessary to show competition, if there is an act or practice in commerce, inimical to the public interest. (*Scientific Mfg. Co.* v. *Federal Trade Commission*, 124 F. (2d) 640 (34 F. T. C. 1793); *Pep Boys* v. *Federal Trade Commission*, 122 F. (2d) 158 (33 F. T. C. 1807)). See also *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149 (34 F. T. C. 1843). We think the practice here employed is contrary to the public interest, and that a proceeding to prevent its further use is in the public interest."

A similar conclusion was reached in *Globe Cardboard Novelty Company, Inc.* v. *F. T. C.* (1941) 1952 F. 2d 444.

In *Modernistic Candies, Inc.* v. *F. T. C.* (1944) 145 F. 2d 454, the Court held that the selling and distribution in commerce of a punchboard designed, intended and conducive to gambling violated the Federal Trade Commission

Act even though the prizes were added by the purchaser of the board. Other cases which have passed on the various questions involved here are *Jaffe* v. *F. T. C.*, 139 F. 2d 112, *Charles A. Brewer & Sons* v. *F. T. C.*, 158 F. 2d 78, *Lichtenstein, et al.* v. *F. T. C.* 194 F. 2d 607.

Respondents next argue that "There cannot be a federal public policy in relation to intrastate transactions which transactions have no direct effect upon interstate commerce." The order of the hearing examiner simply prohibits the selling and distribution in interstate commerce of pushcards, punchboards or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme. It is true that the payment of the consideration for the chance, and the distribution of the prizes, all take place within some state and are subject to such laws as that state may have concerning gambling and lotteries. With that part of the transaction the order is not concerned. In speaking of a similar situation the Court, in *Lichtenstein, et al.* v. *F. T. C., supra,* had this to say:

> "Nowhere has the Commission claimed the power to prohibit the transmission of such lottery devices in interstate commerce as such. The cases construing similar cease and desist orders have all concerned the use of lotteries in merchandising. *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 444 (Cir. 3) [48 F. T. C. 1725] is similarly limited and should not be construed as conferring a general power over lotteries as such. The case of *Scientific Mfg. Co.* v. *Federal Trade Commission,* 124 F. 2d 640 (Cir. 3) [34 F.T.C. 1793, 3 S. & D. 430] made it clear that trade practices were the sole concern of the Commission."

See also *Feitler* v. *F. T. C.* (1953) 201 F. 2d 790.

The exercise of the Commission's powers in this limited area does not depend upon state laws against gam-

bling. There is no conflict here between federal and state powers.

Respondents finally argue that the public policy of the United States can be laid down only in the Federal Constitution or in a law duly enacted by the Congress.

In *Modernistic Candies, Inc.* v. *F. T. C., supra,* the Court said:

> "'The public policy of a state is to be found embodied in its constitution and its statutes, and, when these are silent on the subject, in the decisions of its courts.' *The Illinois Bankers Life Association* v. *Collins,* 341 Ill. 548, 551, 173 N. E. 465. Recently, we said in *Maltz* v. *Sax,* 134 F. (2d) 2, 4, 'Moreover, in the absence of any statute condemning gambling as illegal, the Federal courts have consistently condemned it as against public policy.' We have also held that those who aid and abet such a method of merchandising, those *participes criminis* with gamblers and their schemes, are likewise engaged in unfair trade practices contrary to public policy. *Jaffe* v. *Federal Trade Commission,* 139 F. (2d) 112 [37 F. T. C. 816; 3 S. & D. 610]; *Koolish* v. *Federal Trade Commission,* 129 F. (2d) 64 [34 F. T. C. 1863; 3 S. & D. 492]; *Maltz* v. *Sax, supra.*"

U.S.C.A. Title 15, Chapter 24 forbids the transportation in interstate commerce of "gambling devices" as defined in said law. An exception is made, however, in the case of shipments to any place in any state which has enacted a law providing for exemption from this law. The law further provides in Section 2 that:

> "Nothing in this act shall be construed to interfere with or reduce the authority or existing interpretations of the authority of the Federal Trade Commission under the Federal Trade Commission Act as amended (15 U.S.C. 41-58)."

Report No. 2769, 81st Congress, 2d Sess., pages 9-10, filed by the House Committee on Interstate and Foreign Commerce states:

"Section 2 further provides that nothing in this act shall be construed to interfere with or reduce the authority of the Federal Trade Commission under the Federal Trade Commisson Act as amended. It is the purpose of this provision to leave unaffected the powers of the Federal Trade Commission with respect to the use of lotteries, games of chance, or other gambling devices for the purpose of merchandising. Such use has been held to be an unfair trade practice in violation of the Federal Trade Commission Act as amended."

It thus clearly appears that both the Congress and the Federal Courts have concluded that it is contrary to the public policy of the United States to permit the shipment in commerce of punchboards and pushcards which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

The findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission. Respondents' appeal is denied and it is directed that an order issue accordingly.

Commissioner Kern did not participate in the decision herein.